Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(2)

No. 01-1806

In the
SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA, AND ARMET, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ALASKA, DELAWARE, INDIANA, KANSAS, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, OHIO, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The question presented by this case is whether the First Amendment protects fraudulent misrepresentations regarding the intended uses for charitable donations. The *amici* are States, along with the Commonwealth of Puerto Rico (the "*amici* States"), that strongly believe the answer to this question is no.

With increasing frequency, the *amici* States are being asked to bring the force of state law to bear on those who misrepresent the intended uses for charitable donations. The terrorist tragedies of September 11, 2001, spurred a nationwide outpouring of charitable donations and shifted the public's attention toward how such donations are spent. Citizens are demanding that States take action against fundraisers who misrepresent how charitable donations will be used.

State law is meaningless in these cases, however, if *Ryan v. Telemarketing Associates, Inc.*, 763 N.E. 2d 289 (Ill. 2001), correctly interpreted the First Amendment to immunize those who misrepresent the uses intended for charitable donations. *Ryan* has created substantial uncertainty regarding how and whether States may prosecute this reprehensible form of solicitation, and the case conflicts with decisions of this Court and state courts regarding States' ability to regulate charitable solicitation fraud.

This brief will explore these concerns. Ultimately, the *amici* States urge this Court to grant the writ of certiorari requested by the Attorney General of Illinois and clarify this significant area of First Amendment law.

REASONS TO GRANT THE PETITION

I. *RYAN* HAS CREATED SUBSTANTIAL UNCERTAINTY REGARDING STATES' ABILITY TO PROSECUTE FRAUD CONCERNING THE INTENDED USES FOR CHARITABLE DONATIONS.

In *Ryan*, the Supreme Court of Illinois affirmed the dismissal of a fraud action against a fundraiser because, in that court's view, the fundraiser's actions were protected by the First Amendment. The court did not hold, or even suggest, that the claim brought by the Illinois attorney general was not a valid claim for fraud under state law. Rather, the decision relied solely upon the supremacy of federal law to negate an otherwise valid state action. This decision has created substantial uncertainty regarding the scope of the First Amendment and States' ability to regulate fraudulent representations concerning the intended uses for charitable donations.

A. THE CONDUCT AT ISSUE IN *RYAN* SATISFIES THE COMMON DEFINITION OF FRAUD.

The facts underlying the complaint in *Ryan* are neither complicated nor uncommon. A professional fundraiser contracted with a charity to solicit funds on the charity's behalf. The relevant contractual language obliged the fundraiser to remit to the charity only 15 percent, and in some cases only 10 percent, of the funds collected. The fundraiser solicited funds through telemarketers who contacted potential donors and described to them the services that donations would support. Donors were not told that less than 15 percent (or, in some cases, less than 10 percent) of their donations would be passed on to the charity, let alone that only part of that amount would eventually be used to support the charity's services, depending on the charity's practices.

If the telemarketers' statements intentionally misled donors to believe that at least a substantial portions of their donations would be used to finance the services described, and if those donors relied on that understanding when they made their donations, then under the law of Illinois, the fundraiser committed fraud. By statute, the Attorney General of Illinois has authority to prosecute such actions.

This result, under these facts, is not unique to the law of Illinois. Fraud is generally defined as a knowingly false representation of a material fact made with the intent to induce, and which does induce, another's detrimental reliance. *E.g.*, 37 Am. Jur. 2d *Fraud and Deceit* § 12 (1968); 37 C.J.S. *Fraud* §§ 2, 7 (1997); Restatement (Second) of Torts, § 525 (1977). A statement's literal truth does not preclude the existence of fraud where the message taken as a whole carries a false implication of fact. 37 Am. Jur. 2d *Fraud and Deceit* § 42; 37 C.J.S. *Fraud* § 24; Restatement (Second) of Torts, § 529.

In addition to the common law claim of fraud, states often offer one or more statutory devices to protect the public from fraudulent activities. Statutes based on the Uniform Deceptive Trade Practices Act, adopted in a large number of States, routinely provide consumers general protection from unscrupulous business practices.[1] Some States utilize charitable solicitation regulations to prohibit fraudulent acts in the specific context of charitable fundraising.[2] Also, as in Illinois, States

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[1] *See, e.g.*, Fla. Stat. § 501.201 *et seq.*; Del. Code Ann. tit. 6, § 2511 *et seq.*; Ind. Code § 24-5-0.5-2 *et seq.*; Mich. Comp. Laws § 445.901 *et seq.*; Ohio Rev. Code Ann. § 1345.01 *et seq.*; S.D. Codified Laws § 37-24-6.

[2] Florida's Solicitation of Contributions Act, for example, provides specific regulations regarding solicitors and is enforced by both the state's Attorney General and its Department of Agriculture and Consumer Services. Fla. Stat. Ch. 496. *See*

typically empower a state actor, such as the State's attorney general, to investigate suspected fraudulent activity and, if appropriate, to initiate a suit in a *parens patrie*-type capacity for relief that may include an injunction, sanctions, or money damages.[3]

Under these common law and statutory actions, a fundraiser who tells a potential donor that his or her charitable donation will support a particular service, and thereby represents that at least a substantial portion of the donation will be used in that manner, commits actionable fraud where the fundraiser knows that at least 85 or 90 percent of the funds will not be used to support those services. How that portion of the donation is in fact spent is irrelevant once it is established that this portion will not be used to support the service promoted to the donor at the time of the solicitation.

Accordingly, the fraud prosecution undertaken by the Illinois Attorney General in *Ryan* is representative of suits that could be brought in numerous states based on the same underlying conduct. As the *amici* States show in the following section, that underlying conduct is problematically prevalent, and the States seek this Court's guidance regarding their ability to use state law to challenge such conduct by charitable fundraisers.

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also, e.g., Del. Code Ann. tit. 6, § 2591 *et seq.*; Ind. Code § 23-7-8-7; Kan. Stat. Ann. § 17-1759 *et seq.*; Md. Code Ann., Bus. Reg. § 6-601 *et seq.*; Mich. Comp. Laws § 400.271 *et seq.*; Ohio Rev. Code Ann. Ch. 1716; S.D. Codified Laws § 37-30-17.

[3] *See, e.g.*, Fla. Stat. § 501.207; Del. Code Ann. tit. 6, § 2514; Ind. Code § 24-5-0.5-4; Kan. Stat. Ann. § 17-1773; Md. Code Ann., Bus. Reg. § 6-205; Mich. Comp. Laws § 400.290; S.D. Codified Laws § 37-24-12 *et seq.*

B. STATES REQUIRE GUIDANCE REGARDING THE PROSECUTION OF THOSE WHO MISREPRESENT THE INTENDED USES FOR CHARITABLE DONATIONS.

The *Ryan* complaint described events that are by no means uncommon. Modern solicitation efforts routinely evoke images of desperation in which persons will suffer cruel, undeserved hardships unless someone intervenes to alter that course -- intervention that will come, so the solicitor says, if donors will make the requested charitable contributions.

This technique is applicable in many contexts. Potential donors may be told, for instance, that children in an area are starving and that donations will be used to provide them with life-sustaining food. Donations may be said to provide victims of abuse with care, counseling, or shelter from their abusers. Or, as in *Ryan*, solicitors may claim that donations will provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. *See generally* N. Barborak, *Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 Akron L. Rev. 577 (2000).

High-profile examples of these activities are on the rise, particularly following the surges in patriotism and charity engendered by the terrorist attacks on the United States on September 11, 2001. Those national tragedies encouraged many Americans to aid the victims of the attacks, as well as other causes, and numerous charity drives were launched at that time to great success. Many of those drives made effective use of representations regarding how donations would be used.

By painting a picture of the charitable works that donated funds will serve, fundraisers draw upon the emotions of potential donors. Giving in response to such appeals is understandable, as support for altruistic goals is a particularly human trait. Unfortunately, it is also a trait that may be exploited by those

who would mislead donors about the uses intended for their contributions.

States are receiving an increasing number of complaints regarding representations made in the course of charitable solicitation. In Florida, for example, the State's Attorney General has recently received numerous complaints regarding fundraisers who reportedly touted services for the victims of the September 11, 2001 terrorist attacks but who have given only a fraction of the money raised to support those services. In the case of one such fundraiser, Florida's Attorney General has already filed a suit under Florida's Deceptive and Unfair Trade Practices Act, and similar suits have been filed regarding other supposedly charitable solicitations. Florida understands that other States have also received numerous complaints of such abuses and are contemplating similar actions.

Adding to the heightened awareness of these problems are the media's recent efforts to investigate and publicize charitable solicitation fraud. For example, the front cover of the Sunday, June 30, 2002 edition of the St. Petersburg Times ran a story entitled, "Charity 10%, firefighters union 90%." The article reports that, for the past five years, a Tampa, Florida firefighters union that uses telemarketers to promote a camp for children burned by fire has spent less than 10 percent of the funds raised on charitable services. The story begins:

> The callers ask for donations for Camp Hopetake, a summer retreat where children burned by fire get a once-a-year escape from the rest of the world.
>
> The Tampa firefighters union raises more than a half-million dollars in the name of these children every year.
>
> But most of the money doesn't go to the kids. Last year, for every $100 donated, less than $10 went to Camp Hopetake and other charities. Ninety percent went to the union.

David Karp, *Charity 10%, firefighters union 90%*, ST. PETERSBURG TIMES, at 1A (Jun. 30, 2002). The article continues with a detailed report of the union's solicitation practices, including an account of how the union's telemarketers made potential donors believe that the union's costs were below average, when in fact they were not, by emphasizing that the union did not utilize professional fundraisers.

The increase in complaints regarding misleading charitable solicitations may be due to the application of greater scrutiny toward charitable fundraisers. The increase may also be due to a rise in the number of incidents involving fraud in the course of charitable solicitation. In either case, nothing suggests that this problem is diminishing, and citizens are calling upon the States to respond.

Existing state laws clearly prohibit misrepresenting the intended uses for charitable donations, but the States are mindful of how they expend their limited resources. Pursuing those who commit such frauds will be a misdirection of efforts if, as *Ryan* holds, the First Amendment protects such speech from prosecution. Accordingly, the Court should grant the writ requested in this case and resolve the important issue of whether State law may prohibit charitable fundraisers from misrepresenting the purposes that charitable donations will serve.

II. *RYAN* CONFLICTS WITH THIS COURT'S DECISIONS IN THE *RILEY* TRILOGY AND THE DECISIONS OF STATE COURTS.

In *Ryan*, the Illinois Supreme Court reached its conclusion by relying upon a trilogy of this Court's cases culminating in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). That reliance was severely misplaced, as the *Riley* trilogy involved materially different circumstances and, indeed, affirmatively stated that States may prosecute fraud in the context of charitable solicitations. The Illinois Supreme Court's decision thus conflicts with those cases. It also conflicts with

state court decisions that permitted States to prosecute fraud in connection with the intended uses of charitable donations. Only this Court can resolve these conflicts, and this presents another important reason that the Court should grant the writ of certiorari requested in this case.

Each case in the *Riley* trilogy addressed concerns that were not present in *Ryan*. The first case, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), involved a state law that prohibited certain solicitations by any charitable organization that did not use at least 75 percent of its receipts for "charitable purposes." The second, *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), involved a similar provision, except that it exempted charities that were effectively prevented from raising contributions. In both cases, the Court held that the asserted justification for the statutes -- protecting the public from fraud -- were insufficient to overcome the charities' First Amendment right to speech. The essence of the Court's concern was the impermissibility of categorically equating fraud with a particular level of expenses, given the wide range of interests served and activities undertaken by various charities.

Riley concerned a state law that presumed the existence of fraud once a professional fundraiser's fees exceeded 35 percent, although the presumption could be rebutted. The law further required professional fundraisers to inform potential donors of the percentage of donations the fundraiser turned over to charities in the preceding 12 months. This Court held both aspects to violate the First Amendment. The presumption was invalidated because its premise -- that use of more than 35 percent of donations towards fees alone suggested fraud -- was flawed and because noncommercial speakers should not bear the burden of rebutting a presumption that their speech is unlawful. The Court rejected the percentage disclosure because that compelled speech did not meaningfully inform donors about the uses that donations would serve and only applied to professional fundraisers; thus, the requirement was not narrowly tailored to

meet the state's goal of disclosing how much of a donation would actually benefit a charity.

The *Riley* trilogy does *not* support the proposition that the percentage of funds retained by a professional fundraiser is beyond examination where a fundraiser in fact represents the uses to which donations will be put. Yet it was in this sense that the Illinois Supreme Court misinterpreted these cases. The Illinois court reasoned that the fundraiser in *Ryan* would not have committed fraud had it disclosed the percentage of funds it would retain, and the court read the *Riley* trilogy to forbid States to impose liability for the failure to disclose such information.

Ryan's interpretation of this Court's precedents is simply unsupportable. At most, this Court's holdings preclude the use of certain percentages as a complete and independent basis for presuming fraud in charitable solicitations. By comparison, the Illinois Attorney General alleged in *Ryan* that the fundraiser had made representations regarding how donated funds would be used and that, among other things, the percentage of funds retained by the fundraiser pursuant to its contract with the charity demonstrated that the fundraiser's representations were false. Those representations, together with the specific circumstances of how donated funds were intended to be used and were in fact used, constitute additional facts that take this case far outside the circumstances at issue in *Riley*, *Munson*, and *Village of Schaumburg*.

The Illinois Supreme Court not only misplaced its reliance on the *Riley* trilogy, the court ignored this Court's clear statements in those cases that States are free to prosecute fraud when it occurs in the context of charitable solicitations. *Village of Schaumburg* expressly stated that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. Likewise, *Riley* explained:

> [W]e do not suggest that States must sit idly by and allow their citizens to be defrauded. North

> Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to use it.

487 U.S. at 795. *Ryan* plainly conflicts with these statements.

Ryan also conflicts with state law decisions that specifically permitted States to prohibit fraud regarding the intended uses of charitable donations. For example, in *Marcus v. Jewish National Fund (Keren Kayemeth Leisrael), Inc.*, 158 A.D. 2d 101 (N.Y. App. Div. 1990), the court affirmed a preliminary injunction that prevented a charity from misrepresenting how charitable donations would be used. Rejecting the charity's reliance on the First Amendment and *Riley*, the court concluded: "Certainly, a donor to a charity should be fully informed with respect to the use to which the contribution is being put and should not be misled into believing that the funds will be applied for one purpose when, in reality, they are being utilized somewhere else." *Id.* at 105.

Similarly, in *Commonwealth of Pennsylvania v. Events International, Inc.*, 585 A.2d 1146 (Pa. Commw. Ct. 1991), the court refused to dismiss a complaint by Pennsylvania's Attorney General against fundraisers accused of falsely representing that various charities would receive a substantial portion of contributions, where the charities actually received less than four percent of all contributions. The court held that the fundraisers had no First Amendment right to engage in solicitations that were misleading or deceptive, and the court permitted the case to continue.

These cases support the position that fundraisers should not be permitted to solicit donations by representing that the funds will support particular charitable services when, in fact, a substantial portion of those funds will not be used to support such services at all. Neither *Marcus* nor *Events International* can be reconciled with *Ryan*.

In sum, the Supreme Court of Illinois views the First Amendment as immunizing certain frauds conducted in the

course of charitable solicitation. The *amici* States disagree and support their view with this Court's language in *Village of Schaumburg* and *Riley*, as well as state law decisions such as those noted above. Only this Court can resolve the conflict between these positions, and the *amici* States encourage the Court to do so at this time and clarify this important area of First Amendment law.

CONCLUSION

For each of the foregoing reasons, this Court should grant the writ of certiorari requested in this case by the Attorney General of the State of Illinois.

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